

**ZONING BOARD OF ADJUSTMENT  
MEETING MINUTES  
Thursday – September 1, 2011  
356 Main Street - Farmington, NH**

**Members Present:** Elmer W. "Butch" Barron III, Joanne Shomphe, Paul Parker and Joe Pitre

**Members Absent:** John David Aylard

**Town Staff Present:** Town Planner Kathy Menici and Department Secretary Bette Anne Gallagher

**Public Present:** Maria Dolder, Jason Buote, Laurie Levesque, Robert Forrest, Grant Myhre, Ron Howard

**Chairman Barron called the meeting to order at 7:10 pm.**

**BUSINESS BEFORE THE BOARD:**

- **Review and approve Meeting Minutes of August 4 2011.**

**Additional language added to page 3, paragraph 3 for clarity.**

*Joe Pitre motioned to approve the minutes of August 4, 2011 as amended but due to 2 Board members not having been in attendance at the August 4th meeting, the motion was tabled for lack of a quorum.*

*Joe Pitre motioned to table approval of the minutes to the next ZBA meeting; 2<sup>nd</sup> Joanne Shomphe. Motion carried with all in favor.*

- **Abutter Notification**

Planner Menici explained that currently abutter notifications are sent by certified mail with a return receipt requested however, the requirement for a return receipt was removed by the State RSA in 1985. Also, using the return receipt adds considerable cost for the applicant and requires significant staff time. The statutory notice requirement for abutters is five days but the Post Office gives up to 15 days for an individual to pick up the certified mail. Technically, the Board must wait for all return receipts to come back or for the mail to be returned before the public hearing can be held.

The Chairman asked how notice is proved if return receipts are not used. Planner Menici said the certified mail receipt is the proof of mailing.

The Planner said she did not expect the Board to make a decision at this meeting as a public hearing would be required to amend the requirements but the change could be considered and a discussion and public hearing scheduled. Chairman Barron suggested a public hearing be scheduled for the October 6<sup>th</sup> meeting.

***Paul Parker motioned to schedule a public hearing on amending abutter notice requirements at the October 6th ZBA meeting; 2<sup>nd</sup> Joanne Shomphe.***

Joe Pitre asked if the requirements are in the By-Laws. Planner Menici said they are not, but are in the application and on the fee schedule.

***Motion carried with all in favor.***

- **There was no other business to come before the board.**

**CONTINUED CASES:**

**Application for Variance from Section 2 .00, Table of Permitted Uses by William L. Harvey (Tax Map R64, Lot 9): To allow a mixed commercial and residential use that is not permitted by the Town of Farmington Zoning Ordinance. The parcel is located at 1238 NH Route 11 and is in the Commercial Industrial Business Overlay District. CONTINUED FROM AUGUST 4, 2011.**

Robert Forrest, Esq., presented the application on behalf of Mr. Harvey who presently resides in South Carolina. Attorney Forrest stated that William L. “Pete” Harvey has been an arms dealer in New Hampshire and Massachusetts for 50 years. He has owned and operated the gun shop at 1238 NH Route 11 for the past ten years and Planning Board approval for the gun shop included approval for the 2<sup>nd</sup> floor to be used as storage space only. However, Mr. Harvey used the shop as his home base during his travels around New England and converted the 2<sup>nd</sup> floor to living area without the knowledge or consent of the Town. It was stated that Mr. Harvey felt it was safer to live at the shop in between his travels because of the guns stored there – his presence was a deterrent to crime and this was in everyone’s best interests. Attorney Forrest then addressed the five specific criteria.

**Criteria 1: The Variance will not be contrary to the public interest.**

The building has been on the market for some time and now has a buyer, Ron Howard, who originally intended to operate a gun shop, but is currently seeking approval from the Planning Board to lease the 1<sup>st</sup> floor as a veterinary clinic. Attorney Forrest said that a veterinary clinic would pose security risks similar to the gun shop because of the drugs on the premises and having a residential facility on the second floor would provide security and be in the public’s best interests.

**Criteria 2: The spirit of the ordinance is observed.**

A residential use in a commercial district does not detract from the spirit of the zoning ordinance. He said there are already some mixed use properties in this area and also stated that allowing the apartment would not set a precedent for future applications.

**Criteria 3: Substantial justice is done.**

Mr. Harvey is 83 years old and has been trying to sell this property for a number of years because he now lives in South Carolina. An apartment in the building improves marketability and could benefit the Town as mixed use might generate higher taxes.

**Criteria 4: The value of surrounding properties is not diminished.**

Allowing the apartment would create nothing adverse to abutters.

**Criteria 5: Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.**

Real estate sales for commercial property are almost zero and having an apartment would make a difference in marketing the property which has been on the market for over three years. Mixed use is reasonable and not detrimental to the area.

Chairman Barron said the Board is familiar with the property from the site review in 2002. He said approval was given for the second floor to be used as storage but Mr. Harvey put in the apartment without seeking permits or inspections. Attorney Forrest said that according to Mr. Harvey the Town knew what he was doing. The Chairman asked how – did Mr. Harvey inform the Town? It was Mr. Harvey's claim that the inspector knew. Planner Menici said the apartment was brought to the CEO's attention through a complaint last year and he has been trying to obtain compliance since then.

Chairman Barron said the choices now are compliance or enforcement. He stated based upon the criteria the Board would decide whether a variance was warranted.

There was no indication of intended residential use in either the application or the minutes from the public hearing in 2002. The Code Enforcement Officer received a complaint regarding the apartment and sent a letter to Mr. Harvey who denied having an apartment. The CEO ascertained that Mr. Howard was living there and he was notified by the CEO on February 20<sup>th</sup> that until a variance was obtained, he could not live there. Attorney Forrest said when the property went under agreement in September 2010 apparently Mr. Howard moved in.

Joanne Shomphe asked if Mr. Howard was still planning to buy the property and lease to the veterinary clinic. Attorney Forrest said transfer of title had been scheduled for today, but was postponed to allow him to represent Mr. Harvey pending decision of the Board and will close as soon as possible. He said Mr. Howard was planning to proceed with the purchase regardless of the decision and would lease to the veterinary clinic. Planner Menici said a special exception might be required as this was not a permitted use.

Attorney Forrest said the residential use was not intended for rental purposes but for the use of overnight staff of the clinic as required.

Paul Parker asked if there was something unique about this property that distinguished it from abutting properties. Attorney Forrest said there was not but the property was suitable for this use.

Chairman Barron said the Board would now review the application and consider each criteria.

**Criteria 1: The Variance will not be contrary to the public interest.**

The Board agreed it would not be contrary.

**Criteria 2: The spirit of the ordinance is observed.**

Paul Parker felt that residential use along a public highway was not in the spirit of the ordinance stating that numerous discussions have been had on this subject and the use rejected for health and safety reasons. Chairman Barron said he wasn't sure why mixed use shouldn't be allowed on a major highway. The property is not grandfathered as a pre-existing, non-conforming lot for residential use and there was some confusion as to why if employees would be there for animal care they would need an apartment. Chairman Barron suggested conditions could be put into the approval for this use only, but

Planner Menici said under State law temporary conditions were limited to physical disability. Otherwise, a variance runs with the land and not the use. After some additional discussion the Chairman said they would move on and return to this criteria.

**Criteria 3: Substantial justice is done.**

Chairman Barron said that financial ramifications are not a factor the Board can consider. Joanne Shomphe reminded the members that Attorney Forrest had said the sale would go forward with or without the variance.

Dr. Myhre said granting the variance would be fair to him as a business owner and have no adverse effect on anyone else.

**Criteria 4: The value of surrounding properties is not diminished.**

The Board agreed there would be no diminution of property values.

**Criteria 5: Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.**

There was considerable discussion on the issue of hardship. The Chairman stated that the Board was having a problem seeing the hardship. Although a variance to allow the apartment could make the property more saleable, there was nothing different about the property that precluded it from being used for the intended purpose in the zone. At the same time the Board recognized that there are residential uses on Route 11. Chairman Barron said the ZBA is the relief valve for a unique aspect of a property that affects its intended use.

Chairman Barron said the Board was having problems with two of the criteria - spirit and unnecessary hardship. Joanne Shomphe said there was more of an issue with hardship. The Chairman stated that State law allows the ZBA to consider only things that create a hardship by denial. Not having an apartment does not create a hardship.

*Paul Parker motioned to deny the application for variance on the grounds of spirit and that there is no hardship.* Chairman Barron said there was a motion on the floor to deny based upon no hardship and the spirit of the zoning ordinance not observed and asked for a second. *Motion dies for lack of second.*

The public portion of the hearing had not been closed and the Chairman asked Attorney Forrest to speak to the issue of hardship.

Attorney Forrest said that although financial impact is not a consideration, the owner spent \$100,000 to improve the property as a gun shop and residence and to disregard this is a hardship. Chairman Barron reminded Mr. Forrest that the hardship was brought on by Mr. Harvey himself – that he knew what he was doing and got away with it for eight or nine years.

There was discussion on whether the ZBA could impose conditions that would be applicable to this owner only and not run with the land. The Planner stated again that Town Counsel had been consulted on this issue and it was not allowed except in the instance of a physical disability. Precedent was also considered as were the actions of other NH communities.

The Chairman said no one was here to argue over the actions of other communities, only the zoning ordinance in Farmington was under discussion.

Dr. Myhre, as the potential business lessee, said it was a hardship for him to attempt to provide care at night without an apartment for employees and that at his equine hospital three employees stay all night. The Chairman asked if this would be a primary residence. Dr. Myhre said it would be used by interns and students as a rotating residence.

Paul Parker pointed out that the zoning ordinance doesn't deny a business the ability to work overnight but there is difference between that and a residence. Chairman Barron said the ordinance wouldn't stop the clinic from having a bed or cot for employee use, but the issue of a permanent, full time residence is a problem. Dr. Myhre said eventually a veterinarian would live there.

Attorney Forrest said that Mr. Harvey used the apartment over a period of time, took care of the property and made it what it is today and to deny the continued use of the second floor apartment creates a hardship. Chairman Barron said again that Mr. Harvey was not ignorant of the zoning ordinance and did what he wanted without site review or a building permit. Although the plumbing facilities were already there from a prior owner, this property is not grandfathered. The Planner explained that a non-conforming use can be suspended for only 12 months or the status is lost or if the use changes then the status is lost at that point. Both apply to this property.

Paul Parker said he would like to restate his motion. Modification was suggested and the following motion was made:

*Paul Parker motioned to Deny the Application for Variance from Section 2.00 of the Table of Permitted Uses on the basis of failure to meet the criteria for unnecessary hardship under paragraph 5; 2<sup>nd</sup> Joanne Shomphe. Motion carried by a vote of four in favor and none opposed.*

Attorney Forrest thanked the Board for their time in carefully reviewing this application.

**At 8:45 pm the Board adjourned for a five minute recess reconvening at 8:50 pm.**

**NEW CASES:**

**Application for Variance from Section 3.09 – Signs, Paragraph (C)(2)(a) by Jason Buote and Laurie Levesque (Tax Map R-31 Lot 31): To allow two free-standing signs on the property where the Zoning Ordinance allows one free-standing sign. The parcel is located at 466 NH Route 11 and is in the Commercial Industrial Business Overlay District.**

Chairman Barron recused himself from this matter because he does business with the applicants and they are his neighbors. Joanne Shomphe assumed the chair in his place.

Maria Dolder, Esq., presented the application on behalf of the owners, Jason Buote and Laurie Levesque. Attorney Dolder said the applicants are seeking a variance from Section 3.09(C)(2)(a) of the zoning ordinance to permit an additional free standing sign. She stated the applicants operate B&B Auto and RV Service Center on the property which has frontage on both Route 11 and Meeting House Hill Road. The zoning ordinance permits 2 signs – one free standing and one on the building and this variance is for both signs to be free standing with none on the building. She confirmed that both signs are already there and meet the zoning ordinance requirement of 50 square feet.

Since 1999 there had been a sign on the corner that was removed during the road reconstruction project. The sign would have been grandfathered if it had been replaced in a timely fashion but the applicants were not aware they needed to apply for a permit when they put up the new sign in 2010. Attorney Dolder then addressed the specific criteria.

**Criteria 1: The Variance will not be contrary to the public interest.**

The signs are in conformance with the neighboring commercial properties and direct customers to use the appropriate entrance.

**Criteria 2: The spirit of the ordinance is observed.**

The zoning ordinance allows a fifty square foot sign on the building in addition to a free standing sign, and the variance request is to allow the second sign to be free standing. The placement of the second sign is in the public interest as it identifies the business and entrances. It is safer for customers traveling northwest to turn left at the lights and use the Meeting House Hill Road entrance than to turn left across Route 11 traffic to use the entrance on Route 11.

**Criteria 3: Substantial justice is done.**

Granting the variance will have no adverse effect on neighboring properties and allows the property to be used more productively as the second sign aids in directing customers to the most appropriate and safest entrance to the site.

**Criteria 4: The value of surrounding properties is not diminished.**

The sign has been in place for some time and is tasteful, well landscaped and does not adversely affect surrounding properties. Positive comments have been received since the sign has been up.

**Criteria 5: Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.**

The property has a unique setting as it is located on a corner lot with 500 feet of frontage on Route 11 and 300 feet of frontage on Meeting House Hill Road and 3 entrances. Encouraging use of the entrance on Meeting House Hill Road by directing customers with the free standing sign supports the reasonable use of the property. Other surrounding commercial properties have multiple significant signage and denying this variance would interfere with the reasonable use and cause an unnecessary hardship.

To have the second allowable sign free standing instead of on the building makes sense given the unique setting of the property and its location in the commercial zone. Its location is necessary to assist customers in utilizing the safest and most appropriate entrance to the business.

From 1999 to 2004 when the intersection was improved there was a free standing sign at this location and the applicants thought they were replacing that sign when this one was installed in 2010.

Joanne Shomphe advised the applicants at this time that since the Chairman had recused himself, all three remaining members would have to vote for approval in order to grant the variance and the applicants had the right to continue if this was not acceptable. The applicants decided to proceed.

Paul Parker asked when the sign was taken down and when it was replaced. Attorney Dolder said it was removed in 2004 and put back up in 2010. The applicants had 12 months to replace it under the grandfathered status but they failed to do so. In answer to Joanne Shomphe's question, Attorney Dolder said the original sign was in approximately the same location and did not block vision.

The Board discussed the criteria:

**Criteria #1** was met.

**Criteria #2** – Paul Parker felt the 6 years it took the applicants to replace the original sign was an excessive length of time and, although they were trying to be aware of public safety, he did not feel the applicants' actions observed the spirit of the ordinance. Joanne Shomphe and Joe Pitre felt it did meet the criteria.

**Criteria #3** was met.

**Criteria #4** was met.

**Criteria #5** was met. Joanne Shomphe stated that the size of the premises with significant frontage on two roads was unique and that the sign directing traffic at the lights to the Meeting House Hill Road entrance was in the public interest by not having customers turn left across traffic on Route 11. The Board was in agreement that denying the variance would create an unnecessary hardship.

**Criteria #2** was met. The Board returned to the discussion of criteria #2. It was stated that the applicants did not intentionally violate the zoning ordinance but thought they were replacing the original sign despite the length of time; the square footage of the second sign was within the allowable amount; and Irving was granted additional signage.

Attorney Dolder said granting the variance for the sign allows the most appropriate use of the property by the owner and that by meeting the requirements for the number of signs and the size, the spirit of the ordinance is observed.

After careful consideration and additional discussion, the Board was in agreement that the spirit of the ordinance was observed.

*Joe Pitre motioned to Grant the Application for Variance from Section 3.09 – Signs, Paragraph (C)(2)(a) as requested for two (2) signs in their present location with no additional signage permitted on site; 2<sup>nd</sup> Paul Parker. Motion carried by a vote of three in favor and none opposed.*

*At 9:35 pm Joe Pitre motioned to adjourn, 2<sup>nd</sup> Joanne Shomphe. Motion carried with all in favor.*

Respectfully Submitted,  
Bette Anne Gallagher  
Department Secretary

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Elmer W. "Butch" Barron III, Chairman  
Zoning Board of Adjustment

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Date